STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom	**)**	
	)	
Petition for Arbitration of an Interconnection Agreement	**)**	**03-0570**
with Illinois Bell Telephone Company (SBC Illinois)	**)**	
under Section 252(b) of the Telecommunications Act of 1996	**)**	

INITIAL BRIEF OF SAGE TELECOM, INC.

Henry T. Kelly
Joseph E. Donovan
KELLEY DRYE & WARREN LLP
333 West Wacker Drive, Suite 2600
Chicago, Illinois 60606
(312) 857-7070
(312) 857-7095 facsimile
HKelly@kelleydrye.com
Jdonovan@kelleydrye.com

Attorneys for Sage Telecom, Inc.

PUBLIC VERSION
**PROPRIETARY DATA CONTAINED IN ** **

Filed: November 3, 2003

Table of Contents

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom	**)**	
	)	
Petition for Arbitration of an Interconnection Agreement	**)**	**03-0570**
with Illinois Bell Telephone Company (SBC Illinois)	**)**	
under Section 252(b) of the Telecommunications Act of 1996	**)**	

INITIAL BRIEF OF SAGE TELECOM, INC.

COMES NOW Sage Telecom, Inc., by and through its attorneys Kelley Drye & Warren, LLP, pursuant to the directives of the Administrative Law Judge and 83 Ill. Admin. Code Part 261.10 et seq., and files this Initial Brief in support of the Sage Petition filed in the above captioned proceeding.

The crux of the issue is whether it is appropriate under the governing statutory law that guides this arbitration, the Federal Communications Act of 1934, as amended ("FCA") for this Commission to assert jurisdiction over nonregulated billing and collection services related to ABS services. The FCC has clearly held that billing and collections services are not within the scope of the FCA and, as such, are not regulated services. Therefore, it is Sage's position that it is inappropriate to compel Sage to include the terms of the billing and collection for ABS services in an interconnection agreement governed by Section 252 of the FCA.

The issue before the Commission is very narrow in its scope, but its impact financially on a competitive carrier like Sage can be devastating. If the Commission determines that it is appropriate to include billing and collection terms in the agreement, then it is crucial that the

Commission limit Sage's role to that of a billing and collection agent for SBC's ABS charges. SBC seeks, through its proposed ABS Appendix, to have Sage financially liable for SBC's ABS charges, as well as those ABS charges that are carried by other carriers.

The calls in question are Alternatively Billed Services, or operator service calls. Operator service calls are services offered intraLATA by SBC, MCI, AT&T, Verizon, and a host of other carriers. SBC's operator service calls are classified in Illinois as "competitive services" pursuant to 220 ILCS 5/13-209. The evidence amply demonstrates that Sage is not responsible for originating the call, routing the call, rating the call, or terminating the call. In fact, Sage is not even aware of the call until SBC forwards the Daily Usage File ("DUF") and Sage has the opportunity to process the billing records contained therein. In short, SBC should not be allowed to compel Sage to be a guarantor of SBC's ABS calls.

SBC's proposed ABS Appendix is untenable because it inappropriately places the financial responsibility not on SBC as the provider of the ABS service and the party to whom the revenue flows, but on Sage merely because that SBC ABS call terminated at a Sage end-user's line. The evidence amply demonstrates that this unwarranted pass through of financial responsibility onto Sage will have an extremely negative impact on the financial status of the company. Even assuming that the Commission compels Sage to act as a billing agent for SBC's (and other carriers') calls, the Commission must reject SBC's proposed ABS Appendix and find that Sage's only role in the billing and collection process for SBC's ABS services is that of agent.

Perhaps the situation is best summarized by means of an example. The record before this Commission proves that just under **XX%** of all collect calls originate from inmate facilities, most of which are owned and operated by SBC. Tr., at pp. 380-381, 395; Sage Cross Ex. 2P.

Suppose an inmate at the Cook County Jail wants to call a relative in Chicago. Inmate phones are not capable of coin calling, so the inmate must place a collect intraLATA call, a type of ABS call. The inmate goes to the SBC-owned and SBC-operated inmate payphone and dials "0" and asks the SBC operator to complete the collect call. The call is then routed through SBC's network and systems to the relative who accepts the terms of SBC's offer to complete the call and who happens to be a UNE-P customer of Sage. In short, the collect call is originated on an SBC payphone by a customer using SBC's collect calling services, is run through the SBC operator services and the SBC network, is rated at SBC's tariffed rates and passed directly through to the terminating party, who then authorizes the call to the SBC operator. Sage is never consulted or even notified of the call. Notwithstanding Sage's complete lack of involvement with the call, SBC seeks to force Sage to bear the financial burden for the call. That, in a nutshell, is really the bottom line in this case if it is decided that billing and collection should be included into the interconnection agreement – should Sage be forced to be the financial guarantor of SBC's ABS charges when that call happens to terminate at a Sage end-user? The Public Utilities Commission of Texas has held that Sage should not be forced to guarantee SBC in this circumstance, and this Commission should follow that lead.

At its face value, a $5.00 collect call from an inmate to a relative does not seem like it should raise too much concern. However, add to that single charge all other collect call charges made by SBC's customers, and the figure grows even larger. Further, add to that amount all other ABS charges related to SBC's billed-to-third party and calling card services that SBC's customers will terminate to Sage end users, and you are talking a substantial sum. Further add to that figure all of the third party (i.e., other ILECs, ICXs, etc.) ABS charges that SBC passes through to Sage and wants Sage to also guarantee, and Sage is quickly looking at massive

numbers of calls and an even greater sum of money – despite the fact that Sage does not have a single thing to do with the marketing, placing, rating, routing or terminating of the ABS call. The record shows that forcing Sage to be financially liable for all of these SBC and third party ABS charges may have a devastating effect on Sage's financial health.

I. SUMMARY OF POSITION

Sage has consistently argued throughout this proceeding that the billing and collection terms proposed by SBC are not appropriate in the context of the interconnection agreement process. The interconnection agreement process is governed by the terms of Sections 251 and 252 of the FCA, 47 U.S.C. §§ 251 and 252. In 1986, however, the FCC specifically found that billing and collection services are not regulated under the FCA.

Because billing and collection is an unregulated service that isn't even subject to the scope of the FCA, nor the jurisdiction of the FCC, there is no sustainable reason why an interconnection agreement negotiated pursuant to the FCA and detailing the interconnection of regulated telecommunications services between SBC and Sage should be bogged down with SBC's unreasonable demands. This is precisely the finding of the Michigan and Texas Commissions in its determination related to this exact issue.

In the event that the Commission should determine it appropriate to include billing and collections provisions in the interconnection agreement, then Sage has provided the Commission with an agreement that governs the terms and conditions of billing and collections for ABS services, while still addressing Sage's concerns related to financial liability for SBC and third party ABS charges. In Exhibit 2 to the Petition, Sage provides an interconnection agreement that governs the obligations placed on each party to bill and collect for the other for ABS charges (*see*, Article XXVII, Section 27.16.3), while still finding that Sage "shall not be liable for

Alternatively Billed Service (ABS)" (*see*, Article VI, Section 6.3.4.1). Under this scenario, the parties will continue to operate under the currently agreed-upon business practices that govern the relationship in all ten of the other states in which Sage operates. Sage's proposed language in Section 6.3.4.1 makes clear that it cannot be held financially liable for a product that is marketed to the caller as an SBC service and charged at SBC's tariffed rates.

In spite of the arguments detailed below that it is not appropriate to input all of the terms related to billing and collection in the section 252 agreement, should the Commission feel that it is still appropriate to include an appendix doing so, Sage requests the Commission utilize its proposed ABS Appendix (Exhibit 3 to the Petition), with one modification. In SBC's Revised Exhibits 1.0, attachment 1 (Smith Direct), SBC proposed a new "Option 1" format under which SBC has attempted to meet the objections Sage raised in the Direct Testimony of Sage witness Ms. Timko. If the Commission is to adopt an ABS Appendix in this proceeding, which it should not do so for the reasons stated herein, Sage suggests that the appropriate appendix to use would be its Sage's Exhibit 3, with the addition of SBC's "Option 1" as revised in SBC Ex 1.0 (Smith Direct). While it is clear that incorporating nonregulated services into a Section 252 interconnection agreement is not appropriate, this proposal will still protect Sage from financial liability for SBC's ABS services and charges.

II. INTRODUCTION TO SAGE TELECOM

In ICC Docket No. 01-0508, this Commission granted Sage a certificate to operate as a facilities-based provider of telecommunications service in the State of Illinois.[1] Sage is based out of Texas, and currently operates in a total of ten states where SBC is the incumbent local

[1] *See, Application for a Certificate of Local and Interexchange Authority to Operate as a Facilities based Carrier and/or Reseller of Telecommunications Services in the State of Illinois*, Docket No. 01-0508, Order (dated October 26, 2001)

exchange carrier – Texas, Arkansas, Oklahoma, Missouri, Kansas, California, Indiana, Michigan, Wisconsin, and Ohio. Sage has yet to begin operations in the State of Illinois. However, once an interconnection agreement is in place between the parties, Sage plans to offer telecommunications services to residential and business customers in SBC's service territory in Illinois, with a particular focus on rural and suburban residential customers. Sage Petition, at ¶ 5. Sage provides telecommunications services to residential and small business customers in *rural and suburban communities* outside the metropolitan areas of Illinois. Therefore, Sage's primary business focus in Illinois will be on providing competitive local and interexchange telecommunications services in rural and suburban parts of Illinois for residential and small business customers. Sage Ex. 1.0, at pp. 5-6 (Timko Direct).

Sage relies on SBC's unbundled network element platform ("UNE-P") to provide many of these services. *Id.* Sage's product offerings are based on combining or packaging local, toll (intrastate), and long distance (interstate) offered at a flat monthly rate. *Id*., at pp. 6-7. The offerings include features, such as Caller ID or Call Waiting, and Sage offers other features to customers that can be obtained in addition to the bundled offer. Each of the offerings contains a set number of "long distance" (intraLATA and interLATA) minutes that the customer may use as part of the flat monthly fee. *Id.*

III. BACKGROUND OF ABS BILLING AND COLLECTION ISSUES BETWEEN SAGE AND SBC

If the Commission agrees with Sage that inclusion of SBC's proposed ABS Appendix and its terms related to the unregulated billing and collection services should not be incorporated in the interconnection agreement entered pursuant to the FCA, then the analysis stops there.

Should the Commission decide otherwise, then the core of the issue facing the Commission in this arbitration is, if billing and collection terms are to be incorporated in the interconnection agreement, whether Sage should be held financially liable for SBC and third party ABS charges that are terminated to a Sage end user. In order to better understand the issue, then, Sage will provide some background on the scope of Incollect calls and ABS services, as well as the billing and collection practices negotiated and implemented between Sage and SBC in each of the ten states in which Sage operates.

The proposed interconnection agreement proffered as Exhibit 2 to Sage's Petition contains the definition of Incollect calls. An Incollect call is one that originates from a number other than the billing number and that is billable to Sage's end-use customer (typically in the case where the Sage end-use customer accepts a collect call provided by SBC or another third party carrier). *See*, Sage Ex. 1.0, at p. 14 (Timko Direct). Pursuant to Article XXVII, Section 27.16.3, Incollect calls are defined as follows:

> 27.16.3 Incollects: For messages that originate from a number other than the billing number and that are billable to [Sage] customers **("Incollects")**, SWBT will provide the rated messages it receives from the CMDSA network or which SWBT records (non-ICS) to [Sage] for billing to Sage's end-users. SWBT will transmit such data on a daily basis. SWBT will credit [Sage] the Billing and Collection **("B&C")** fee for billing the incollects. The B&C credit will be provided in accordance with the procedures set for the in Article XXXVIII of the Agreement and the credit will be $0.03 per billed message. [Sage] and SWBT have stipulated that a per message charge for SWBT's transmission of Incollect messages to [Sage] is applicable, and SWBT will bill [Sage] for the transmission charge.

Similarly, ABS services are defined as either collect, billed-to-third party or calling card calls. Tr., at p. 345. ABS calls are also billed to a telephone number not the same as the originating number. *Id*. Incollect calls are an example of ABS calls, and by far the greatest number of ABS calls are collect calls. Incollect calls and ABS (alternatively billed services)

calls are synonymous with "operator service calls", the more common term used by this Commission

As a provider utilizing SBC's UNE-P offering, Sage has experienced in other states, and expects to experience in Illinois, substantial problems associated with SBC's improper attempts to hold Sage financially liable for ABS charges forwarded from SBC to Sage. These ABS charges result from, for instance, a SBC customer (or a person using a SBC payphone or inmate facility payphone) originating a collect call to a Sage end-user and that end-user agrees to accept the charges. In those circumstances, SBC markets and provides the ABS service, an SBC customer chooses to make an ABS call, SBC's operators and systems process the call, SBC establishes the rates to be assessed for completion of the call, and then SBC will forward the billing data to Sage for processing and collection based upon SBC's tariffed rates. Tr., at p. 346 (in the case of person-to-person and inmate collect calls, the surcharge would be $4.88). SBC then submits that billing data to Sage in the form of messages on the Daily Usage Feed. Sage then takes that billing data and prepares bills to the end users for the ABS charges. Sage has neither the ability to be consulted on whether the call should go through, or verify the accuracy of the billing and rate data that SBC provides it for billing. In short, Sage has nothing to do with the ABS call other than acting as a billing agent.

The problem comes when the end user that agreed to accept the charges for the SBC or third party ABS call refuses to make payment, despite Sage's efforts at collecting the amount owed. SBC asserts that Sage should be responsible for the financial impact of that end users' failure to pay because the end user happens to use Sage for its local exchange service – even though, as demonstrated, Sage has absolutely nothing to do with the call and can assert no influence to compel payment of the call. SBC's insistence that Sage be financially liable for

these uncollectible calls has forced Sage to dispute the bills and has lead to the filing of complaints in other jurisdictions over the appropriate liability for these ABS charges. At least one state commission has held that Sage "should not be responsible or liable to SWBT for any Incollect [i.e., ABS] charges that are uncollectible." *Texas Revised Arbitration Award,* Exhibit 8 to Sage's Petition, at p. 212.

In order to avoid the need for such a complaint proceeding in Illinois, Sage has recommended language in the interconnection agreement that clearly states that it is not responsible for any of SBC's ABS charges. SBC insists upon its ABS Appendix which holds Sage financially liable for not only SBC's ABS charges, but any ABS charges SBC processes for third parties. That is the basis upon which Sage was compelled to file this Arbitration.

IV. BUSINESS PRACTICES DEVELOPED

As discussed above, the issue of billing and collection for ABS services has already been litigated in other jurisdictions. In Texas, the first state commission to address the issue of liability for ABS charges that remain uncollected, Sage filed a complaint disputing the ABS charges for which SBC was continuing to bill Sage. The Texas Commission issued an interim order[2] in Sage's complaint proceeding and then decided the final merits on the ultimate issue (i.e., finding that Sage only serves as SBC's billing and collection agent and bears no financial responsibility for uncollectible amounts) in a larger arbitration involving many parties, including Sage. In the *Texas Interim Order*, the Texas Commission held as follows:

[2] *Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company for Implementation of Billing Procedures for Incollect Calls*, PUCT Docket No. 24593 (filed Sept. 4, 2001). On October 15, 2001, the Texas Commission issued an Order on Interim Relief in PUCT Docket No. 24593 ("Texas Interim Order") and consolidated Sage's Complaint with and ultimately decided on the merits of the complaint in PUCT Docket No. 24542, *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Under the Telecommunications Act of 1996*. A copy of the relevant portions of the Revised Arbitration Award issued on October 3, 2003 in Docket No. 24542 was attached as Exhibit 8 to the Petition for Arbitration.

(1) Sage is required to bill its end-use customers using the SBC rated DUF records for Incollects;
(2) Sage is required to implement a tracking system for billing and collections for incollect calls;
(3) for the amounts of incollect charges that are collected as a result of the bills, Sage is required to pay SBC those amounts as soon as practical; the payment requirements under the Interconnection Agreement are suspended for Incollects (*e.g.*, the 30-day payment period);
(4) Sage will make good faith efforts to collect the incollect amounts billed to its end-use customers; and,
(5) in the event that a Sage customer falls into arrears more than 60 days for incollect calls, Sage is to notify SBC. SBC may elect to block all collect calls to that end-user.

When the Texas Commission issued its interim order with the above findings, Sage and SBC worked on implementing those decisions through business-to-business discussions. As SBC witness Smith acknowledges, these discussions resulted in a number of business practices that the two parties have implemented that govern the billing and collection for ABS services – business practices that the two parties have adopted in each of the ten SBC states in which Sage operates. Tr., at pp. 196-198. Those business practices are the norm between the two companies and govern the relationship and obligations with respect to ABS billing and collections. Sage and SBC have worked to take care of issues as they arise. Importantly, while these business practices were initiated as a result of the *Texas Interim Order*, the day-to-day business practices that govern the billing and collections are not the result of regulatory prodding or Section 252 interconnection agreements.

Just as important, however, is the fact that even SBC agrees that Sage has met its obligations under the *Texas Interim Order* and *Texas Revised Arbitration Order* with respect to billing and collection of ABS charges. In fact, according to SBC, it is "pleased with the progress and cooperation that has been made in developing business practices with Sage in regards to ABS." SBC Ex. 1.0, at p. 24 (Smith Direct). As SBC witness Smith attests to in his cross

examination, Sage has satisfactorily completed the obligations listed above under the *Texas Interim Order*.

> Q. Has Sage – the four examples you list are requirements on Sage coming out of the [Texas Interim] Order. Has Sage been billing its end users on behalf of SBC?
> A. From my understanding, yes, but just not collecting.
> Q. Has Sage implemented track systems as required under the Texas Order?
> A. From my understanding, yes.
> Q. Has Sage paid the amounts it collects to SBC –
> A. What –
> Q. as required under the Texas order?
> A. What little they collect, yes.
> Q. Has Sage notified SBC of the accounts in arrears as per the Texas order?
> A. From my understanding, yes.

Tr., at pp. 198-199. Mr. Smith goes on to admit that Sage is blocking ABS traffic on particular customers when SBC asks that it do so. Tr., at p. 205. In short, SBC admits that Sage has complied with the requirements imposed upon it by the Texas Commission.

It is these business practices, governed by agreements of the parties separate and aside from their respective interconnection agreements that should govern the billing and collection practices between the parties. The process has worked in ten states, and as SBC's own witness points out, both parties "are pleased with the progress and cooperation." SBC Ex. 1.0, at p. _ (Smith Direct). Notwithstanding such progress and cooperation, SBC still seeks to have the Illinois Commission enter an order making this the only state that will input the terms and conditions associated with billing and collections for ABS services into a Section 251 and 252 interconnection agreement. As discussed below, such a position is in direct conflict with close to twenty years worth of FCC precedent with respect to the FCA's jurisdiction over billing and collection services.

A. UNDER THE FCA, BILLING AND COLLECTIONS ARE NOT A REGULATED SERVICE AND SHOULD NOT ENCUMBER AN INTERCONNECTION AGREEMENT GOVERNING SERVICES THAT ARE ACTUALLY SUBJECT TO THE FCA

As Staff witness Mr. Zolnierek states, the interconnection agreement process is governed by the terms of Sections 251 and 252 of the FCA, 47 U.S.C. §§ 251 and 252, and the interconnection agreement at issue herein is subject to the terms of the FCA. Tr., at pp. 33-34. No party to this proceeding has disputed that claim.

In 1986, however, the FCC specifically found that billing and collection services do not employ wire or radio facilities and do not allow customers of the service to "communicate or transmit intelligence of their own design and choosing. … In short, billing and collection is a financial and administrative service."[3] On this basis, the FCC held that "***billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the [Federal Communications] Act***." *Id*., at ¶ 34. The FCC went on to hold that it will not assert any ancillary jurisdiction over billing and collection services under Title I of the Federal Communications Act, as well.[4]

Thus, for nearing two decades, the FCC has not asserted jurisdiction under the FCA for billing and collection services. Notwithstanding the clear lack of jurisdiction under the FCA, SBC seeks to bog down the interconnection process for those services that are regulated under the FCA by demanding Sage insert language in its Interconnection Agreement related to nonregulated services. Because billing and collection is an unregulated service that isn't even subject to the scope of the FCA, nor the jurisdiction of the FCC, there is no sustainable reason why an interconnection agreement negotiated pursuant to the FCA and detailing the

---

3 *In the Matter of Detariffing of Billing and Collection Services*, FCC Docket No. 85-88, Report and Order, 102 FCC.2nd 1150, ¶ 32 (rel. January 29, 1986).

4 *Id*., at ¶ 37.

interconnection of regulated telecommunications services between SBC and Sage should be hindered with SBC's proposed ABS Appendix.

Importantly, SBC has yet to dispute this very basic foundation. SBC has not provided a single FCC or state commission order that reverses the determination that billing and collection services are unregulated under the FCA – nor can SBC do so. The reason for that is simple, nothing has changed since the FCC initially determined that billing and collections should be unregulated service. In short, the determination made in 1986 stands strong today and any attempt to re-regulate these services under the guise of a Section 252 interconnection agreement is wholly inappropriate. The Commission should reject SBC's proposed ABS Appendix for this reason alone.

1. At least two other state commissions facing the same issues currently pending before this commission have held that terms related to the unregulated billing and collection for ABS traffic should not be included in the Section 252 interconnection agreements.

As explained above, this proceeding is not the first time that a dispute has arisen related to the billing and collection role of CLECs for SBC's ABS services. SBC has attempted to lay the burden of guaranteeing its revenues on the shoulders of CLECs in both Texas and Michigan by including its ABS Appendix in a Section 252 interconnection agreement. Importantly, both Commissions held that including billing and collection language in the interconnection agreement was inappropriate. For instance, in the *Michigan MCI Arbitration* case,[5] SBC proposed the same ABS Appendix it initially offered to Sage in this negotiation process in order

[5] *In the Matter of the Petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for arbitration of the interconnection rates, terms, and conditions, and related arrangements with MCIMetro Access Transmission Services, LLC, pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. U-13758, Opinion and Order (August 18, 2003) ("*Michigan MCI Arbitration Order*") (relevant portions of which were attached as Exhibit 4 to the Petition for Arbitration).

to set forth the terms and conditions for ABS billing and collection for UNE-P ABS traffic.[6] Just like Sage in this proceeding, MCI argued that the entire appendix should be omitted because the ABS Appendix constitutes unregulated billing and collection services that are not required to be part of an interconnection agreement governed by the FCA. *Id*., at p._46-47. Importantly for this Commission's review of the issue, the Michigan Commission held that "[Alternate Billed Service] is an unregulated billing and collection service, the terms of which may be worked out by the parties ***without the need for Arbitration as part of the Interconnection Agreement***."[7]

And the Michigan Commission is not alone in that finding. In facing this same issue, the Texas Commission held that "[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties ***and should not be incorporated into an interconnection agreement***." *Texas Revised Arbitration Order*, at p. 212.[8]

There is no reason why this Commission should adopt a policy any different than its fellow commissions in Texas and Michigan. Billing and collection services are clearly a nonregulated service not within the realm of the FCA. As staff acknowledges, the interconnection agreement process is governed by Section 252 of the FCA. As the Texas and Michigan Commissions held, such services should be the subject of agreements outside the scope of the interconnection process.

---

6 *Id*., at p. 46.

7 *Id*., at p. 47.

8 *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE-P Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, PUCT Docket No. 24542, Revised Arbitration Award at 212 (Oct. 3, 2002) ("*Texas Arbitration Award*") (relevant portions of which were attached to the Petition for Arbitration as Exhibit 8)..

2. The evidence demonstrates that the costs incurred by Sage in order to bill and collect on behalf of SBC for SBC's ABS charges far outweighs the measly $0.05 credit granted.

SBC tries to convince the Commission that Sage could make all sorts of revenues by simply adding an additional surcharge on to the monthly bills of its end users to account for ABS services. SBC Ex. 1.0, at p. 4, 15 (Smith Direct). Sage first questions the legality of SBC's proposal. When an end user accepts an SBC-collect call, the rates for that call are governed by SBC's tariff filed with the Illinois Commerce Commission. (Sage Cross Ex. 1.) Nowhere in that tariff does SBC state that other companies may impose a surcharge for billing that call.

Despite SBC's attempts to cast the burden of acting as billing and collections agent for SBC as a revenue maker for Sage, such is not the case. SBC fails to provide any sort of explanation as to how Sage will actually implement these farcical suggestions. Will Sage impose these surcharges on all of its end users and just debit those customers who might actually receive a collect call in any given month? Or, perhaps it would be a better source of revenue to Sage if it were to impose surcharges on only those customers who actually get a collect call – ignoring the fact that those are some of the same people who don't pay their ABS charges in the first place. Adding additional surcharges that won't get paid on top of the unpaid SBC ABS charges would hardly make them more likely to pay the charge, and certainly not serve as a source of additional revenue to Sage! Thus, SBC's arguments of the mythical billing and collection revenue machine are pure fantasy and should be rejected outright.

The discussion of revenues does lead to one interesting point, however. The only "revenue" Sage will receive for billing and collections associated with SBC's ABS charges is the $0.05 per message Billing and Collection credit issued by SBC. From this nickel credit, Sage is supposed to be able to recoup the costs associated with billing and collecting SBC's ABS

charges and "offset the administrative costs in processing these ABS charges." SBC Ex. 2.0, at p. 5 (Burgess Direct). The sad truth is that the $0.05 credit doesn't even come close to matching the direct administrative costs associated with performing the role. In fact, Sage is loosing money by performing the role of billing and collections agent.

Measured up against that $0.05 credit are all of the costs associated with performing the duties of a billing and collections agent. The evidence is undisputed that each and every ABS bill Sage submits to its end users on behalf of SBC costs Sage $1.07. Sage Ex. 2.0, at p. 8 (Timko Rebuttal). That is, from the very inception of the billing and collection service that Sage has and will continue to offer SBC, Sage is automatically in the hole no less than $1.02 per bill![9] Add to that amount the three days a month of work time it takes the Sage Comptroller to process the ABS charges; remit the payments received; and, track past-do amounts for SBC's monthly aging reports. *Id*. Further, Sage incurs additional costs are incurred by for responding to customer inquiries and complaints about ABS charges that Sage is unable to verify or process because all necessary data is in the hands of SBC; the costs of any late notices that have to be mailed out (i.e., printing, envelope, postage); and, any other costs associated with collecting late payments. *Id*. The truth is that Sage has an enormous investment in trying to make SBC whole for its ABS charges. It is absolutely certain that Sage is not coming anywhere near experiencing "revenue" – let alone "break even" – for the billing and collections role SBC asserts is a "revenue generator". But that is apparently not good enough for SBC, as it also wants Sage to undertake the burden of being financially liable for SBC's ABS charges as well.

[9] $1.07 – 0.05 = $1.02.

3. Despite the fact that its costs far outweigh the one-time $0.05 credit Sage receives, Sage remains ready and willing to negotiate and enter into a billing and collection agreement with SBC outside the scope of the regulated Section 252 interconnection agreement.

Notwithstanding the above costs and difficulties, Sage has agreed and will continue to act as SBC's billing and collections agent for these SBC ABS charges, so long as it is clear that Sage is neither responsible nor liable for any of SBC's revenues. To be clear, Sage has always been ready and willing to proceed with such negotiations and enter a billing and collection agreement with SBC that contains mutually acceptable terms and conditions negotiated free from the regulatory regime of the Section 252 interconnection agreement process. In fact, that is just the process that Sage has followed with dozens of other carriers with which it has entered into such billing and collection agreements. The record demonstrates amply the existence of such negotiated agreements governing the billing and collection roles and negotiated outside the scope of the interconnection process. *See*, Sage Ex. 2.0, Attachment B (compilation of various agreements entered into between sage and other carriers).

The record also demonstrates that SBC itself has entered into numerous such billing and collection agreements with both its affiliates and third party IXCs that govern the process by which the SBC local exchange affiliate bills and collects for services rendered by the affiliate, also outside the context of arbitrated interconnection agreements. SBC witness Smith discussed the existence of billing and collection agreements between it and other third parties like MCI. See, e.g. Tr., at p. 181, 200 (SBC witness Smith discussing agreements between SBC and various IXCs and its long distance affiliate). Further, the record provides an example of the standard SBC affiliate billing and collection agreement pursuant to which SBC local exchange affiliates will bill and collect its customers on behalf of SBC's advanced services affiliates. *See*, Sage Ex. 2.0, attachment A (Timko Rebuttal). Unlike the ABS Appendix that SBC seeks to have inserted

into the Section 252 interconnection agreement, however, SBC admits that none of these IXC or affiliate billing and collection contracts were submitted to a commission for approval under Section 252 of the FCA. Tr., at p. 163 (SBC witness Smith opining that the SBC affiliate billing and collections contracts involving its local exchange affiliates should not be subject to the terms of a Section 252 interconnection agreement and approved as a regulated service). Importantly, in this SBC affiliate agreement, SBC's local exchange affiliate is given the ability to fully recourse 100% of any uncollectibles back to its data affiliate. In other words, SBC's local exchange affiliates are ***NOT*** held financially liable when its customers refuse to pay the SBC data affiliate charges. Unfortunately, SBC does not provide Sage with similar treatment, as it seeks to impose financial responsibility on Sage for SBC ABS charges that remain unpaid by the end-user. It is no wonder why SBC does not want to have to submit its affiliate billing and collections agreements for approval pursuant to Section 252, as that would allow CLECs like Sage the opportunity to operate under the far more favorable terms included in the affiliate agreements than the ABS Appendix.

4. The Commission should find that billing and collections are a nonregulated service under the FCA and should not be included in an interconnection agreement that governs services that are regulated under the FCA by rejecting SBC's proposed ABS Appendix.

No party has disputed the fact that the interconnection agreement at issue in this proceeding is subject to and governed by Section 252 of the FCA. Further, no party has or can dispute the fact that the FCC has specifically held that billing and collections are not regulated under the FCA. This Commission must hold that it is inappropriate to include such terms and conditions in the interconnection agreement. As such, the Commission must find for Sage and, like its fellow commission in Michigan and Texas, hold that "[ABS] matters over the UNE

platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement."

V. IF THE COMMISSION DECIDES THAT IT IS APPROPRIATE TO INCLUDE BILLING AND COLLECTION TERMS IN THE INTERCONNECTION AGREEMENT, THEN THE PROPOSED SECTIONS 27.16 AND 6.3.4.1 IN EXHIBIT 2 TO SAGE'S PETITION SHOULD SUFFICE.

As explained above, it is not appropriate to include in a Section 252 interconnection agreement any terms and conditions related to the nonregulated billing and collection issue. However, in the event that the Commission determines that it is appropriate to include such billing and collection terms in the interconnection agreement, then it is important that the Commission expressly limit the role of Sage to be that of billing and collection agent for SBC only. With such a finding, Sage will not face the financial pounding associated with being forced to be a guarantor for SBC's ABS charges, not to mention those third party ABS charges that SBC passes through to Sage.

If it is held that such terms are appropriate in a Section 252 interconnection agreement, then Sage encourages the Commission to adopt its proposed Exhibit 2 to the Petition. In that Exhibit, Sage has provided the Commission with an agreement that governs the terms and conditions of billing and collections for ABS services, while still addressing Sage's concerns related to forcing it to be financially liable for SBC's ABS charges. In Exhibit 2 to the Petition, Sage provides an interconnection agreement that provides the obligation for each party to bill and collect for the other parties' ABS charges (s*ee*, Article XXVII, Section 27.16.3), while still finding that Sage "shall not be liable for Alternatively Billed Service (ABS)" (*see*, Article VI, Section 6.3.4.1). Under this scenario, the parties will continue to operate under the currently agreed-upon business practices that govern the relationship in all ten of the other states in which

Sage operates. At the same time, this agreement provides clarity that Sage cannot be held financially liable for a product that is marketed to the caller as an SBC service and charged at SBC's tariffed rates.

IV. ADOPTION OF THE SBC PROPOSED ABS APPENDIX IMPROPERLY FORCES SAGE TO GUARANTEE SBC'S REVENUES, SOMETHING THAT SBC DOES NOT EVEN DO FOR ITS OWN AFFILIATES.

At its base, SBC's position is that its ABS Appendix is appropriate because of SBC's belief that Sage is responsible for the ABS charges. The evidence before this Commission, however, belies such a claim as it is clear that Sage is not responsible for the ABS charges, nor could it in light of the fact that Sage has no role in marketing, processing, rating, routing or terminating the ABS call and does not find out about the existence of the either the call occuring or the SBC charges accruing until well after the call is through and disconnected.

Further, in an ultimate act of hypocrisy, SBC seeks to impose the terms related to billing and collection contained in its proposed ABS Appendix on Sage in this interconnection agreement, while at the same time keeping the terms related to how it bills and collects for its own affiliates unavailable to other parties.

1. SBC's position that Sage is responsible for the ABS charges is fundamentally flawed and without foundation in the record.

Both SBC witnesses argue that the terms of the ABS Appendix are appropriate and Sage should be financially liable for the ABS charges accrued because Sage is responsible for the charges. Under SBC's strained and tortured logic, because Sage disagrees with the "options" that SBC has made available in its ABS Appendix, Sage should be responsible for all ABS charges when end users do not pay. SBC Ex. 2.0, at p. 20 (Burgess Direct).

As explained below, the evidence before this Commission just does not support the foundational position of SBC. Sage cannot, and should not, be responsible for the ABS charges incurred as a result of SBC marketing its ABS services to an SBC customer, that SBC customer choosing to use SBC's ABS services, routing the call through SBC's operator services, rating the call based upon SBC's tariffed rates and terminating to an end user without Sage's consent or knowledge of the call. It is clear that Sage is not "responsible" for the ABS call and should not be responsible for the ABS charge. The facts simply do not support SBC's foundation.

i. While SBC claims Sage is responsible for the ABS charges, it is clear from the record that UNE-P CLECs like Sage account for only a microscopic fraction of the ABS charges billed by SBC.

The evidence shows that exchange of ABS records between the UNE-P CLECs like Sage and SBC is so lop-sided that it causes one to question whether the service is truly reciprocal. For instance, in August 2003, just in Illinois, the total ABS charges billed ***to UNE-P carriers by SBC*** and for which SBC seeks to have the UNE-P carrier be financially liable was in excess of **$XXXX**. Tr., at p. 396; Sage Cross Ex. 6P. At the same time, in August 2003, the reciprocal total ABS charges billed ***to SBC by the UNE-P carriers*** was just **$XXX**! *Id*., Sage Cross Ex. 6P. No, that is not a typo and your eyes are seeing the number correctly, that is **XXXXXXXXXXXXXXXXXX**, or a mere **XXXX%** of the total amount of ABS charges billed to the UNE-P CLECs by SBC. SBC's own witness Ms. Burgess acknowledges the numbers on cross examination:

> Q. So the dollar value of traffic that SBC is asking CLEC's to bill is in excess of **$XXX** as the numbers reflect there, but the dollar value that SBC is being asked to bill, at least in August of 2003, is less than **$X**?
> A. That's a correct statement.

Tr., at pp. 396-397. Thus, SBC is asking the CLECs like Sage to be financially responsible for and guarantee an amount in excess of **$XXXXX** worth of SBC ABS charges a month, while

SBC is only forced to be responsible for and guarantee the CLECs ABS traffic in an amount that would constitute a cheap lunch in the Loop. Maybe the CLECs should just "supersize" the order. No wonder SBC is so interested in having its ABS Appendix adopted by this Commission!

Sage also notes that SBC witness Smith spends considerable time and effort attempting to distinguish the fact that the billing and collection agreements SBC has with IXCs (including SBC's affiliated long distance provider) allows for full recourse, while its ABS Appendix does not.[10] According to Mr. Smith, one reason why the IXC agreements allow for full recourse back to the IXC (i.e., SBC cannot be held financially liable for the uncollectible amounts) is because the IXC agreements are a one-way street. Mr. Smith argues that recourse in that instance is acceptable because SBC is "not sending things back to our IXC." Tr., at p. 239-240.

However, applying Mr. Smith's logic to the facts of this case, the fact that there is such a massive imbalance in the amount of charges billed between SBC and the UNE-P CLECs just supports the claim that Sage, too, should have full recourse rights. It is readily apparent that UNE-P CLECs, like SBC on the IXC example, do not bill their ABS traffic back through to SBC. The numbers above show that this, too, is a one-way street. If Mr. Smith's arguments are to be given any weight, then full recourse is clearly just as appropriate for these UNE-P CLECs.

Further, the evidence also demonstrates that roughly **X %** of the ABS traffic at issue in this proceeding are collect calls. SBC's own witness has admitted on cross examination that "between **XX and XX %** of those collect calls originate from an inmate facility, most of which would be SBC's …". Tr., at pp. 380-381, 395; Sage Cross Ex. 2P. Thus, SBC's inmate facilities could be responsible for up to **XXXX%**[11] of all collect calls made, but SBC would

---

[10] And Mr. Smith rightly spends such time and effort to distinguish the IXC recourse rights from the ABS Appendix financial liability, as this fact alone crushes SBC's claims with respect to an "industry standard" related to billing and collection. It is clear that the IXC "industry standard" allows for full recourse.

[11] **XX% x XX% = XX%**

not be liable for a penny of any of those calls that would terminate on a CLEC end user customer. Notably, SBC has a system already in place that permits SBC to receive advanced payment from its customers for collect calls made from inmate facilities. Tr., at p. 224-225.

In light of the fact that close to **XX%** of the ABS calls made stem from inmate facilities and that SBC's own witnesses admit that most of those inmate facilities are owned and operated by SBC, SBC's claim that Sage is "responsible" for the ABS charges is wholly without merit and unsupported by the record. The record amply demonstrates that SBC is in fact the cause of an overwhelming majority of the ABS traffic according to its own witnesses.

ii. SBC's tariffs belie its claim that Sage is responsible for the ABS charges, as SBC itself imposes that responsibility on the customer using the ABS services.

SBC's claim that Sage is responsible for the ABS charges is also contradicted by SBC's own tariffs on file with the Commission. During cross examination of SBC witness Ms. Burgess, Sage asked her to review and explain SBC's tariffs that govern its operator assisted calls, including charges associated with ABS calls. SBC Tariff 19, Part 11, Section 1, 6th Revised Sheet No. 16 describes SBC's Operator Assisted Call Surcharges as follows (emphasis added):

> ***When a customer requests*** that a call be handled in such a manner that operator assistance in completion of the call is necessary, ***such as alternate billing***, person-to-person service, or requests other special handling of the call, appropriate Operator Assisted Call Surcharges apply as follows.

Sage Cross Ex. 1. The Commission must note that the surcharges only apply "when a ***customer*** requests that a call be handled" so as to require operator assistance. The tariff does not say anything about the SBC tariff's surcharges being applied as a result of another CLEC like Sage requesting the call take place. The tariff does not say anything about the SBC tariff's surcharges being applied as a result of the terminating customers acceptance of the call. No, rather, SBC's

own tariffs impose the responsibility for ABS charges on the shoulder of the SBC customer who requests the ABS call. As such, it would appear that SBC's own tariffs defeat its position that Sage is "responsible" for ABS charges.

Further, the ABS charges are directly attributable to SBC's own tariffs, not as a result of anything for which Sage could be deemed responsible. The same Sage Cross Ex. 1 lists each and every SBC ABS surcharge that can be assessed against its customers for making that ABS call. Sage has no say in those rates, nor could Sage modify, waive, delete, or otherwise have any control over the rates assessed against SBC's customers when they incur the ABS charges. Again, Sage cannot be responsible for ABS charges based upon tariffed rates established and maintained solely by SBC.

iii. Sage cannot and should not be held responsible for an ABS charge for which is was not consulted and was not aware even existed when accrued.

Yet another gap in the logic of SBC's claim that Sage is responsible for the ABS charges and should therefore be liable for them is the fact that Sage is not consulted in the callmaking process wherein the ABS charge is accrued. In fact, it is undisputed in the record that Sage is not even made aware of the ABS call until well after both parties have hung up, SBC has forwarded the Daily Usage Feed to Sage and Sage has processed its contents. Sage Ex. 1.0, at p. 20 (Timko Direct). Further, SBC admits on cross that it does not consult with Sage to get its approval for the ABS charge either before, during or after the call. Tr., at p. 405. Rather, as discussed above, SBC's tariff requires that SBC get that approval for the call from the customer, not Sage. Sage Cross Ex. 1. As Sage is neither consulted with nor even knowledgeable of the ABS charges, Sage cannot be deemed the "responsible" party for the charge.

2. SBC's reliance on the supposed "industry standards" is misplaced at best and without any foundation in the record.

As explained in detail above, as a result of the *Texas Interim Order*, SBC and Sage have negotiated a number of business practices outside of the scope of any interconnection agreement that governs the responsibilities of the parties for billing and collection of ABS services. Sage has further explained that the Texas Commission has expressly held that Sage ***is not*** financially responsible for any of SBC's uncollectible ABS charges that end users fail to pay. These business practices are the norm between SBC and Sage in each and every state in which Sage currently operates. Thus, the parties have a standard by which they operate with respect to billing and collection of ABS charges.

Notwithstanding this standard developed over the last couple of years between SBC and Sage, SBC seeks to interpose what it refers to "industry standards" on the manner in which some particular "industry" bills and collects for ABS services. Sage must put quotes around the word "industry" because the record is void of any foundation to either support the claim that such standards exist, or as to what "industry" the witnesses are referring.

Despite SBC's claims to the contrary, the record is absolutely void of any foundation for its claim that there even exists any "industry standards". SBC can speak of these alleged standards until it is blue in the face, but that does not make them any more real. Illinois courts have long held that a witness's opinion testimony is only as valid as the factual reasons and bases for the opinion. *See*, e.g. *Hiscott v. Peters*, 324 Ill.App.3d 114, 123 754 N.E.2d 839 (2001).

> the trial court is not required to blindly accept the expert's assertion that his testimony has an adequate foundation. Rather, ***the trial court must look behind the expert's conclusion and analyze the adequacy of the foundation***." *Id*., quoting, *Soto v. Gaytan*, 313 Ill.App.3d 137, 146, 728 N.E.2d 1126 (2000).

A witness's opinions cannot be based on mere conjecture and guess. *Id.*, quoting, *Dyback v. Weber*, 114 Ill.2d 232, 244, 500 N.E.2d 8 (1986). Here, both SBC witnesses provide references to alleged industry standards. However, neither witness provides any foundation for their unsubstantiated assertions, nor any citation to any such foundation. In short, neither witness provided the foundation necessary to make the unfounded discussions related to these standards.

Further, even assuming these mythical standards exist, the standards upon which SBC relies are vague at best, and not proven at all. SBC has two witnesses who claim that the industry standards for ILECs who handle ABS state that the terminating ILEC agrees to be fully responsible. SBC does not provide a single piece of evidence of any agreement that establishes that framework. SBC does not provide a single piece of evidence of any industry-wide accepted standard that is codified by any national industry forum. SBC does not provide a single piece of evidence showing any dates upon which these practices evolved or even if these practices are followed for any significant amounts of monies. SBC just makes allegations of "industry practices" without providing any proof as to their existence or terms. Instead, Sage is the only party to provide evidence of what appears to be an industry proposal – SBC's own affiliate contract for billing and collection services which allows for full recourse of uncollectibles.

Further, the evidence shows, and SBC witness Smith admits, that Sage has followed the business practice in place – practices that SBC and Sage have mutually negotiated and implemented in all ten states in which Sage operates. Sage bills, collects and remits the ABS charges. Sage uses Selective Toll Blocking to prevent collect calls from certain inmate facilities in which SBC is the payphone provider. Per the mutually negotiated business practice, Sage requests Toll Blocking Exception ("TBE") at the direction of SBC. Sage submits these are the relevant business practices that should be considered and they support Sage; not SBC. The

Commission must ignore SBC's alleged "industry standards", as SBC has failed to provide any evidence whatsoever that such standards even exist. At bottom, the record is void of any foundation necessary to support SBC's claims.

VII. SBC'S PROPOSED RESERVATION OF RIGHTS IS SUPERFLUOUS TO THE LANGUAGE ALREADY IN THE AGREEMENT AND IMPROPERLY HAS THIS COMMISSION WAIVING ANY AUTHORITY UNDER STATE LAW TO IMPOSE UNBUNDLING REQUIREMENTS ON SBC.

In its single issue raised in response to the SBC Petition, SBC argues that the current Reservation of Rights Language must be replaced in order to account for certain specific FCC, ICC or judicial orders either adopted or believed to be adopted in the future. SBC Response, at pp. 5-7. SBC appears to be under the impression that, unless the Agreement specifically states the existence of a proceeding or order that possibly could impact the manner in which the terms are governed, then the language is deficient and must be replaced. Such is not the case, however, by the very terms of the language that SBC hopes to supplant.

SBC's proposed language lists no less than a dozen FCC, ICC, judicial or General Assembly actions that it specifically wants interposed into the Reservation of Rights language. For the reasons stated below, SBC's proposal must be rejected. In short, the language in the existing agreement currently contemplates each of the specific proceedings that SBC seeks to delineate with its proposed language. Further, it is inappropriate for the Commission to adopt the habit of listing every case that could/may/might impact the terms of the agreement in its reservation of rights section, as that will eventually lead to excessively long lists of each case that did/does/will exist that could impact the agreement. In light of the existing language that specifically contemplates each of the regulatory, judicial or legislative actions that SBC lists in its proposed language, there is no need to change the reservation of rights language. The

Commission should approve the current reservation of rights already included in the proposed agreement submitted as Article XXIX, Sections 29.2 and 29.4 of Exhibit 2 to Sage's Petition.

1. By its proposal, SBC seeks to remove any separate state authority to order unbundling of network elements.

Despite SBC's altruistic claims to the contrary, Sage suspects that the real motivation behind SBC's proposal is not to list the various commission or court proceedings that may impact the terms of the agreement at some point in the future. Rather, Sage believes that the real motive behind the proposal is to attempt to get rid of the state unbundling requirements guaranteed by the Illinois Public Utilities Act and various ICC orders. In short, SBC seeks to have the Commission adopt language that will substantively have the Commission preclude itself from asserting the authority granted it under the Illinois PUA to order any unbundling requirements on SBC.

SBC has quietly slipped into its proposed language an assertion that SBC limits its obligations under the agreement to provide only those UNEs, or combinations of UNEs, ordered pursuant to ***federal*** law.

> ***SBC ILLINOIS shall have no obligation to provide UNEs, combinations of UNEs, combinations of UNE(s) and CLEC's own elements or UNEs in commingled arrangements beyond those required by the [Federal Communications] Act***, including the lawful and effective FCC rules and associated FCC and judicial orders. The preceding includes without limitation that ***SBC ILLINOIS shall not be obligated to provide combinations (whether considered new or existing) or commingled arrangements involving SBC ILLINOIS network elements that do not constitute required UNEs under 47 U.S.C. § 251(c)(3)*** (including those network elements no longer required to be so unbundled), or where UNEs are not requested for permissible purposes.

SBC Response, Attachment 1 (emphasis added). Apparently, SBC doesn't wish to acknowledge that this Commission has independent authority under ***Illinois*** law to impose unbundling requirements on SBC. The Commission cannot be fooled by this tactic.[12]

It is unconscionable for SBC to require or request that Sage waive their rights under Illinois law as a condition to obtaining an interconnection agreement that SBC is required to provide under Sections 251 and 252 of the FCA.

Sage will not agree to any language that explicitly or implicitly limits this Commission's authority to impose unbundling conditions on SBC – nor should this Commission. At bottom, neither this Commission nor SBC can force Sage to waive a right it is granted under ***Illinois*** PUA! Try as SBC may to ignore the unbundling requirements of the Illinois PUA, they do not (and can not) just disappear.

By adopting the language proffered by SBC, the Commission will be directly limiting the unbundling requirements on SBC to only those deemed appropriate by the FCC. This finding would run directly counter to the clear and express requirements under the Illinois PUA that SBC is required pursuant to the ***Illinois*** law, not the federal Communications Act or FCC orders, to provide CLECs with network elements that will permit the CLECs to provide "end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers.. . ." 220 ILCS 5/13-801(d)(4). Thus, as a matter of state law, it is clear that Illinois' ILECs, including SBC, have an

[12] Nor can the Commission be lulled into complacency by any claim that silence as to the state unbundling requirements does not intend to limit any such authority. If that is the key – that silence can not infer such a limitation – then why does SBC so desperately wish to not be silent on the dozen or so proceedings it wishes to list. If the failure to list or note an item is not deemed a limitation, then there is no need to list any proceedings at all.

obligation to provide end-to-end network elements to CLECs. That is, SBC is obligated pursuant to ***Illinois*** law to provide UNE-P services.

In addition, Section 13-505.6 of the Illinois Public Utilities Act provides that the ICC may order Illinois telecommunications carriers to unbundled network elements and make those elements available to competitors "based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act." 220 ILCS 5/13-505.6.

Adoption of the proposed language proffered by SBC may wipe out both of these state law requirements. That, in Sage's view, is why SBC is so keen on seeing the Commission adopt its proposed language. There is no reason why this Commission should adopt language that would limit the authority given it by the General Assembly. While SBC has attempted to "sneak one past the goalie", the Commission must reject this tactic and reject SBC's proposed limitation of independent state authority.

2. The cases cited to in SBC's proposed language are already covered in the existing Reservation of Rights language.

In its proposed language, SBC specifically lists no less than a dozen FCC or court cases that it wants to make specific reference to in its reservation of rights language. These cases range from the recent *FCC Triennial Review Order*[13] to an FCC Biennial Review Order expected to be commenced some time in 2004 (with no indication as to when an actual FCC order will be issued). SBC's supposition is that these cases were not contemplated while the parties negotiated the proposed agreement and so the Reservation of Rights language already included in the agreement is not sufficient.

---

[13] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, (rel. August 23, 2003).

Such is not the case, however. The current Reservation of Rights provisions already encompass not only the particular proceedings listed by SBC, but also covers any other "legislative, regulatory, judicial or other legal" actions. As such, SBC's proposed language is superfluous.

The Current Reservation of Rights language is contained in Article XXIX, Sections 29.3 and 29.4, and reads as follows (emphasis added):

> 29.3 Amendment or Other Changes to the Act; Reservation of Rights. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date. ***In the event of any amendment of the Act, or any legally binding legislative, regulatory, or judicial order, rule or regulation or other legal action that revises or reverses the Act***, the FCC's First Report and Order in CC Docket Nos. 96-98 and 95-185 or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an "**Amendment to the Act**"), ***either Party may by providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement.*** If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its rights and remedies with respect to the collection of such rates or charges on a retroactive basis; including the right to seek a surcharge before the applicable regulatory authority. In the event that such new terms are not renegotiated within ninety (90) days after such notice, or if at any time during such 90-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 28.3 of this Agreement. For purposes of this Section 29.3, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed. Without limiting the general applicability of the foregoing, the Parties acknowledge that on January 25, 1999, the United States Supreme Court issued its opinion in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999) and on June 1, 1999, the United States Supreme Court issued its opinion in *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (1999). In addition, the Parties acknowledge that on November 5, 1999, the FCC issued its Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-96 (FCC 99-238), including the FCC's Supplemental Order issued *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, in CC Docket No. 96-98 (FCC 99-370) (rel. November 24, 1999), portions of which became effective thirty (30) days following publication of such Order in the Federal Register (February 17, 2000) and other portions of which became effective 120 days following publication of such Order in

the Federal Register (May 17, 2000). The Parties further acknowledge and agree that by executing this Agreement, neither Party waives any of its rights, remedies, or arguments with respect to such decisions and any remand thereof, including its right to seek legal review or a stay pending appeal of such decisions or its rights under this Section 29.3.

29.4 Regulatory Changes. ***If any legally binding legislative, regulatory, judicial or other legal action (other than an Amendment to the Act, which is provided for in Section 29.3) materially affects any material term of this Agreement or materially affects the ability of a Party to perform any material obligation under this Agreement, a Party may, upon written notice, require that the affected provision(s) be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new provision(s) as may be required; provided that such affected provisions shall not affect the validity of the remainder of this Agreement.*** In the event that such new terms are not renegotiated within ninety (90) days after such notice, or if at any time during such 90-day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) days, the dispute shall be resolved as provided in Section 28.3 of this Agreement. For purposes of this Section 29.4, legally binding means that the legal ruling has not been stayed, no request for a stay is pending, and if any deadline for requesting a stay is designated by statute or regulation, it has passed.

The Commission must note that each of the dozen or so listed cases, proceedings or statutory changes SBC seeks to have imposed in its reservation of rights language are already encompassed in the above quoted reservation of rights. In short there is no need to go through the effort to specifically list certain legislative action or regulatory/court proceedings when the existing language already contemplates their existence. Every one of the past, current or future proceedings SBC lists, as well as the various appeals cases are "***legislative, regulatory, judicial or other legal action***" that would be enveloped into the current reservation of rights provisions highlighted in Section 29.4. As such, upon written notice of their final binding legal orders, both parties are obligated to enter into negotiations to implement the findings. There is no need to modify the current language as it already addresses each of the requested proceedings.

Sage also has concerns about the propriety of listing all of the various past, present and future proceedings in the agreement to begin with. Sage acknowledges that, due to the nature of using current agreements as the template for negotiating the Sage agreement, the proposed

agreement in Exhibit 2 lists some past regulatory or court proceedings. That notwithstanding, the addition of these numerous additional proceedings as proposed by SBC is still not warranted. Where will the need to list every possible ICC, FCC, Court or legislative proceeding that may/can/will/might have an impact on the amendment end? Must the Commission address each and every ICC and FCC proceeding, each and every appeal of those proceedings, each and every reopened or reconsidered proceeding, etc. in order to adopt agreements? That would be a silly waste of the Commission's time and resources, but the logical end result of adopting SBC's proposed language. If the Commission gets in the habit of listing each and every case that may have an impact on the terms and conditions of the agreement, the result would be an inexhaustible list that will bog down every future adoption of an interconnection agreement.

Further, why stop at just the 12 or so proceedings SBC lists? There are dozens of other proceedings that can/may/will have an impact on the parties' rights under the agreement. For instance, the ICC is currently undergoing four investigations stemming from the FCC's *Triennial Review Order*. If the *Triennial Review Order* will have an impact on the parties rights under the agreement, then surely those four ICC investigations implementing the *Triennial Review Order* will as well. Under SBC's theory, each of these four dockets should be listed as well. What about the current appeal of an ICC order implementing the terms of Section 13-801 of the PUA, including its requirements that SBC provide UNE-P pursuant to state law? What about the pending appeal related to the passage of SB 885 and its TELRIC rate-setting methodologies? There are dozens of other proceedings that exist today that can/may/might/will have an impact on the parties' rights under this proposed agreement. To selectively pick out a few of these proceedings and list them is inappropriate and an effort of folly. This is especially true given

that the existing language categorically covers each and every proceeding listed by SBC, as well as the dozens that are not listed by SBC.

For the foregoing reasons, Sage recommends that the Commission reject SBC's proposal and adopt the language already approved by this Commission in a number of other interconnection agreements and contained in Exhibit 2 to the Petition (Article XXIX, Sections 29.3 and 29.4).

WHEREFORE, in light of the foregoing, Sage respectfully requests this Commission to enter an order finding that SBC cannot force, as a precondition to interconnection, Sage to act as the Billing and Collection agent for, or a guarantor of, third party billed calls originated by SBC's customers. In following the Texas and Michigan Commissions, the Commission should reject SBC's proposed ABS Appendix and hold that ""[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement**."** *Texas Revised Arbitration Order*, at p. 212. If the Commission determines otherwise, Sage requests that the Commission adopt Sage's proposed language attached as Exhibit 2 to the Petition, which places Sage in only the role of Billing and Collection agent for SBC, and not be forced to be financially responsible for all of SBC's and third party's ABS charges when the end user fails to pay the charge. If the Commission determines that it is appropriate to add an appendix to the interconnection agreement, Sage respectfully urges the Commission to reject SBC's proposed ABS Appendix for the reasons stated and adopt Sage's proposed contract language attached as Exhibit 3 to the Petition, with the only modification being the addition of SBC's revised "Option 1" as proposed in SBC's Revised Ex. 1.0.

Respectfully submitted,
SAGE TELECOM, INC.

_____
By: One of Its Attorneys

Henry T. Kelly
Joseph E. Donovan
333 West Wacker Drive, Suite 2600
Chicago, Illinois 60606
(312) 857-7070
(312) 857-7095 facsimile
HKelly@kelleydrye.com
Jdonovan@kelleydrye.com